

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ACTION CARTING ENVIRONMENTAL SERVICES, INC.,

Employer,

and

LOCAL 813, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioner,

Case No. 22-RC-12875

and

LOCAL 621, UNITED WORKERS OF AMERICA

Intervenor

Case No. 22-CA-28197
22-CA-28211
22-CA-28337

LOCAL 621, UNITED WORKERS OF AMERICA

Case No. 22-CB-10530

and

SHAFI GADSON, an Individual.

**GENERAL COUNSEL'S ANSWERING BRIEF TO
INTERVENOR/RESPONDENT'S EXCEPTIONS 1-4**

Introduction

General Counsel files this answering brief to Exceptions 1-4 filed by Intervenor/Respondent, Local 621, United Workers of America.¹

Argument

A. GC's Answer to Intervenor's Exception 1: Contrary to the Exception, There is Not Sufficient Evidence Supporting a Finding That the Employer Demoted Shafi Gadson To a "Shape" Employee in July 2007.

This answer is to the Intervenor's first exception. There, the Intervenor excepts to the ALJ's factual finding that the Employer (or "Action") demoted Shafi Gadson to a shape employee in December 2007.²

First, a definition of terms. As the ALJ found and the Intervenor does not dispute, the Employer (or "Action") employs "shape" drivers and shape helpers who are not assigned a regular route and do not work each night. (ALJD, page 4, lines 15-25). It is also not disputed that Action hired Shafi Gadson as a shape helper in February 2006 and, because of his excellent performance, made him a regular helper in about March 2006. (ALJD, page 8, lines 16-17 and page 25, line 44). The ALJ found that Action decided in December 2007 to demote Gadson to a shape employee. (ALJD, p. 25, line 50).

The Intervenor argues that the record supports the finding that Action demoted Gadson back to a shape employee in July 2007. However, there is no record evidence to support such a finding. There is no evidence of a *de jure* demotion or an action taken by

¹ General Counsel also filed an Exception in this case.

² Counsel for the General Counsel took the position at the hearing and in her brief that there was insufficient evidence that Action ever demoted Gadson.

the Employer to demote Gadson. The Intervenor points to no evidence that Action demoted Gadson in July 2007. It does not point to any facts undermining those relied upon by the ALJ in reaching his conclusion that Action demoted Gadson in December 2007. In his decision, the ALJ described in detail the reasoning of the Operations Manager in December 2007 for his decision to demote Gadson and the fact of the demotion. (ALJD, p. 9, line 1-10).

Intervenor's argument is that some, but not all facts testified to by Gadson reflect a *de facto* demotion. Intervenor argues that Gadson's testimony that beginning in July 2007, he was assigned to work on different trucks instead of a regular route and did not work each night, supports the conclusion that that beginning July 2007, he returned to the status of a shape employee. But there is no evidence that Action operated so strictly that an employee who did not work regularly to an absolute degree became, by default, a shape employee.

In fact, the evidence is to the contrary. After July 2007, Gadson retained many indicia of a regular employee. After July 2007 and until his termination, Action provided Gadson with a uniform, (Tr 353-54, 612; GC Ex 6) even though it conceded that shape employee do not receive uniforms. (Tr 608). Gadson received health insurance benefits effective July 1, 2007 and continued receiving benefits through the time of his termination (GC Ex 6; GC Ex 12; Tr 358-59), even though, according to Action, shape employees do not receive health benefits. (Tr 1023). Gadson received holiday pay, (GC Ex 12) even though, shape employees at Action do not receive holiday pay. (Tr 1050). Action deducted and transmitted to the Intervenor union dues from Gadson's paychecks, (GC Ex 12), although the Union does not believe it represents the shape employees.

Gadson testified that after July 2007, he asked his supervisor, Danny Alfano, why he was not being sent out everyday. (Tr 403). Alfano said that he did not know. (Tr 403). He asked Mike O'Donnell the same question and got the same answer. (Tr 439).

Thus, there are insufficient facts to support a finding that Gadson became, *de jure* or *de facto*, a shape employee in July 2007.

B. GC's Answer to Intervenor's Exception 2: The GC Proved and the ALJ Correctly Found that The Employer Believed That Gadson Engaged in Protected Concerted Activity.

The Intervenor, in its second exception, asserts that the ALJ incorrectly found under *Wright Line* that the Employer discharged Gadson in violation of Section 8(a)(3) because the ALJ failed to find protected activity and knowledge. Protected activity is not however a requirement for an 8(3) discharge. Unlawful motivation is. The Board has held that:

[A]ctions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity.
[Monarch Water Systems, 271 NLRB 558](#), fn. 3 (1984); Accord: [United States Service Industries, Inc. 314 NLRB 30](#) (1994).

The ALJ based his conclusion that Action unlawfully discharged Gadson on his finding that Supervisor Alfano unlawfully told Gadson that Alfano knew that Gadson supported Intervenor's rival, Petitioner Local 813, Teamsters. (ALJD, p. 25, line 52 through p. 26, line 1. *See also* ALJD, p. 10, lines 1-2; p. 23, lines 20-23 and p. 26, lines 4-5). The Employer undisputedly opposed Local 813. (ALJD, p. 22, line 52 through p.

23, line 11). Thus, the ALJ has cited the Employer's belief that Gadson engaged in protected activity.

The Employer is obviously charged with knowledge of activity known to its undisputed agent and supervisor, Daniel Alfano. The Intervenor does not dispute the ALJ's finding that Alfano was a supervisor. (ALJD, p. 3, line 18-19). Thus, the ALJ did make the required findings as to belief and knowledge, to which no one has excepted.

In addition, the ALJ found and the Intervenor does not dispute that Gadson, by directly confronting Action Supervisor Daniel Alfano in response to unfair labor practices he committed as a supervisor, asserted his right on several occasions to be free from unlawful interrogation by his Employer (ALJD, p. 9, line 22 and p. 10, lines 1-2), asserted his right to be free from intimidation attempted through threats by his Employer (ALJD, p. 9, line 24; p. 22, lines 17-18; p. 25, lines 50-51), and asserted his right to be free from surveillance by the Employer (ALJD, p. 9, lines 47-48, p. 23, lines 20-23; p. 26, lines 1-2). All of this constitutes protected activity within the requirements of *Wright Line*.

C. GC's Answer to Intervenor's Exception 3: Intervenor Has Failed to Assert a Proper Exception Pertaining to the Credibility of Shafi Gadson and Failed to Meet Its Burden To Overrule the ALJ's Finding that Gadson Was Not A Credible Witness.

Intervenor asserts that the ALJ erred in crediting the testimony of Gadson "in general." This exception is insufficiently vague as it is not directed at a specific portion of the decision as required by the applicable rules. NLRB Rule 102.46(b)(1). In fact,

there was no “general” finding as to Gadson’s credibility. Thus the exception is improper.

Even if the Intervenor had pointed to a specific credibility finding involving Gadson, Intervenor has not met its requisite burden. The Board's established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), *enf’d*, 188 F.2d 362 (3d Cir. 1951). Where Gadson’s testimony contradicted a witness, such as where it contradicted the testimony of Supervisor Daniel Alfano, the ALJ made a relative finding, relying on the lack of credibility of Alfano. (*See* ALJD, p. 22, lines 17-41). Intervenor does not assert that Alfano was credible. Accordingly, by failing to deal with the relevant portions of the record, the Intervenor cannot meet its burden as to the clear preponderance of all of the relevant evidence.

Intervenor points only to two portions of the record. First, it points to Gadson’s testimony as to his work assignments after July 2007. Intervenor does not dispute the accuracy of this testimony. It only disputes that this testimony is consistent with Gadson’s belief that he remained a shape employee after that time. The record shows ample basis for Gadson’s belief that he was a shape employee, as described above in the General Counsel’s Answer to Exception 1.

Second, Intervenor points to a document that it alleges supports the Employer’s contention that it discovered, after terminating Gadson, that Gadson had “scanned in” without working so that he could get paid for not working. But this allegation, as the ALJ specifically found without exception, was not litigated at the hearing. (ALJD , p. 26,

line 43). Thus, none of the record relied upon by the Intervenor amount to a clear preponderance sufficient to overrule a credibility finding.

D. GC's Answer to Intervenor's Exception 4: Intervenor Has Failed to Support a Valid Wright Line Defense to the Unlawful Transfer of Frank Madden.

1. The GC Proved and the ALJ Correctly Found that Madden Engaged in Protected Concerted Activity and That The Employer Knew of the Activity.

Intervenor first argues that the record does not reflect that Madden engaged in protected activity and that the Employer had knowledge of the activity. However, the ALJ found that Madden was an active supporter of Local 813 by distributing cards for that union, and that his support was known to the Employer, whose supervisor told Madden that he heard that he was soliciting workers to join that union. (ALJD, p. 27, lines 46-51). Thus, there was activity and knowledge.

2. The Intervenor Has Not Posed Proper or Persuasive Exception to the ALJ's Finding that the Asserted Reason for Madden's Transfer was Pretextual.

In this exception, Intervenor merely argues that the Employer properly transferred Madden to Brooklyn. Here again, the exception is not proper as it points to no finding that is at issue.

Intervenor then attempts to relitigate the case. It argues that the Employer made a legitimate decision to relocate from Newark to Brooklyn a route consisting in part of Brooklyn. It argues that the Employer made a nondiscriminatory decision to assign the relocated route from a more senior employee to Madden.

However, the Intervenor excepts to none of the findings and reasoning that supported the ALJ's conclusion that the Employer's asserted basis for the transfer of madden was pretextual. As to the Employer's decision to remove the Brooklyn route

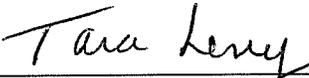
from a more senior employee, see ALJD, page 28, lines 14-31. As to the decision to relocate the route at all, see ALJD, p. 28, lines 33-36. Intervenor has not successfully undermined these findings and conclusions.

The only specific portion of the record pointed to by the Intervenor involves the ALJ's description of the size of the two routes involved. Intervenor characterizes the description as confused but never connects the supposed confusion to the findings concerning pretext. Thus, the Intervenor has not succeeded in establishing a *Wright Line* defense to the unlawful transfer of Frank Madden.

Conclusion

Based on the foregoing, the judge's rulings, findings and conclusions to which the Intervenor excepted should be affirmed, along with the entire decision apart from as previously excepted by the General Counsel.

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